Filed 4/23/19 P. v. Tye CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW TYE, Defendant and Appellant.	G055099 (Super. Ct. No. 10HF2304) ORDER MODIFYING OPINION, DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

It is ordered that the opinion filed March 27, 2019, be modified as follows:

1. On page 2, at the end of the final sentence of the second paragraph, ending with "the return of property order," a new footnote No. 2 is added that reads:

In his petition for rehearing, defendant contends a member of the appellate panel is biased against him, and "must be disqualified from the rehearing and further appeals," citing Code of Civil Procedure section 170.1, subdivision (a)(6), in support. Section 170.1 does not apply to appellate court justices. (Code Civ. Proc., § 170.5, subd. (a); cf. *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 939.) Defendant's disqualification demand is therefore denied.

2. On page 2, the second sentence of the first paragraph of the "Facts" should read: "On December 13, 2013, the district attorney filed an eight-count amended information, naming only one of the girls as a victim."

3. On page 3, the original footnote No. 2 is deleted.

4. On page 3, the second sentence of the third paragraph, beginning "The computer tower contains," is deleted and replaced with: Trapp testified he came into possession of a computer seized from the defendant that contained videos of defendant having sex with a 13-year-old girl and a 17-year-old girl. Defendant objected to this testimony and the objection was overruled.

5. On page 4, the third paragraph, beginning "Defendant stated he wanted . . . ." is deleted and replaced with a new paragraph:

In his "Motion to Enforce Plea Agreement," defendant stated that "[t]he files designated by [d]efendant for retention are: <u>all files</u>" (original underscoring), other than the contraband files that had been previously specified for deletion. Similarly, in defendant's concomitant "Request for Order to Show Cause Re: Contempt," defendant declared "[m]y right under the plea agreement, is to designate the files I want returned. By design, there is no limitation on my designation. Therefore, I have designated all remaining files, once the specified evidence has been deleted." Finally, in the "Relief Requested" portion of his opening brief on appeal, defendant continues his unequivocal demand that "all remaining data from the Computer following the deletion of the specified files . . . be returned to Appellant." Defendant did not amend or modify his motion or request for order to show cause, and it was these the court denied when it ruled, "The motion to enforce the plea agreement is . . . denied [and] [t]he request for an order to show cause for contempt is denied." That denial is the subject of this appeal.

6. On page 4, the fourth paragraph, beginning "The prosecutor argued. . . ." is deleted and replaced with a new paragraph:

The prosecutor stated: "If there are maybe a couple specific files that [defendant] can direct a forensic investigator to that he needs, then I think we can take it from there. . . . [¶] . . . [¶] . . . Or if [defendant] wants to pay the cost of an investigator to be assigned to go through the entire thing . . . ."

7. On page 9, three new paragraphs are appended to the end of footnote No. 3 as follows:

Defendant also contends the trial court's denial of his motion to return his computer and its contents violates *Brady v. Maryland* (1963) 373 U.S. 83. He misconstrues *Brady*. The prosecution, not a court, violates a criminal defendant's federal constitutional right to due process when: (1) evidence "'favorable to the accused'"; (2) is "suppressed" by the prosecution; and (3) "'prejudice . . . ensue[s]'" because the suppressed evidence is "material [either] to his guilt or to punishment." (*Skinner v. Switzer* (2011) 562 U.S. 521, 536-537.) Defendant claims there are files on the computer containing *Brady* material because they included favorable evidence material to the punishment he could possibly face in a yet to occur probation violation proceeding. We are not persuaded. *Brady* does not apply to unrealized future proceedings, and defendant provides no contrary authority. Moreover, the parties have conceded defendant is no longer on probation. As such, there is no chance of a future probation revocation hearing or any resultant sentence. Finally, *Brady* is a trial right, and once judgment has been entered, *Brady* is not applicable except in collateral proceedings reviewing the original judgment. (Cf. *DA's Office v. Osborne* (2009) 557 U.S. 52, 69 ["*Brady* is the wrong framework" to assess due process concerns following judgment].)

In his petition for rehearing, defendant argues the trial court erred in denying his motion for specific performance because the court lacked jurisdiction to alter any of the terms of the plea agreement, citing *People v. Segura* (2008) 44 Cal.4th 921, in support. This jurisdictional argument was raised briefly in the trial court , but not in defendant's opening brief. Instead, it was raised for the first time in defendant's reply

brief. *Segura* was cited in a footnote in defendant's opening brief, but it was in reference to one of his prior appeals, where he had objected to a postplea protective order. Legal arguments raised for the first time in a reply brief will not be considered absent good cause. (*People v. Whitney* (2005) 129 Cal.App.4th 1287, 1298.) Defendant has not shown good cause.

The remainder of defendant's rehearing petition mostly reargues the case by challenging our original opinion's legal and factual analyses. It also launches a host of ad hominem attacks on the members of this court, the trial judge, the prosecutor, law enforcement, and the judicial system in general. "Despite the general lack of specified grounds for rehearing in the statutes and rules, case law has established that the petitioner must do more than reargue the case." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 905, p. 967, and cases cited.) Because the substance of defendant's rehearing petition is an attempt to reargue the case, with defendant restating contentions from his trial court motions, his opening and reply briefs, and his oral argument, it is not well-taken. As for his invective directed to the criminal justice system and its constituents, it is unsupported by legal authority and argument, and does not show where in this appellate record his grandiloquent conspiracy theory is factually rooted. To the extent his diatribe is even arguably cogent, it is not properly raised in a petition for rehearing.

These modifications do not affect the judgment.

The petition for rehearing is DENIED.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.

Filed 3/27/19 P. v. Tye CA4/3 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW TYE, Defendant and Appellant.	G055099 (Super. Ct. No. 10HF2304) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Gary S. Paer, Judge. Order affirmed. Request for judicial notice denied.

Matthew Tye, in pro. per., for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Paige B. Hazard, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant was charged in a 25-count information with 23 sex offenses against two minor females and two counts of attempting to dissuade the girls from reporting the crimes. Pursuant to a plea bargain, the district attorney filed an amended information alleging eight felony sex offenses against one of the two girls, defendant pled guilty to the amended information, received a probationary sentence, and waived his right to appeal the conviction. Nevertheless, this is defendant's seventh appeal in this case.[1]

When defendant pled guilty, the court signed an order for the return of defendant's property. In this appeal, defendant challenges the court's denial of his subsequent motion to enforce plea agreement and order the return of his property. We conclude the superior court did not err in offering to permit him to withdraw his guilty pleas, but denying him specific performance of the return of property order.

Because we affirm on this ground, we need not reach and express no opinion on the Attorney General's argument that this appeal should be dismissed since defendant's motion to enforce the plea agreement is essentially a nonstatutory motion for return of property and, as a result, the challenged order is not appealable.

FACTS

As stated above, the original information in this case charged defendant with 23 sex offenses against two minor females, and two counts of attempting to dissuade the victims from reporting the crimes. On December 13, 2013, the district attorney fled an eight-count amended information, naming only one of the girls as a victim. Pursuant to a plea bargain entered into that same day, defendant pled to the five counts of oral copulation on a minor (Pen. Code, § 288a, subd. (b)(1)) and three counts of unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (c)) charged in the amended information.

[1] Defendant has also filed two writ petitions pertaining to proceedings after his conviction.

The court imposed the negotiated sentence and ordered defendant committed to the county jail for one year with five years of supervised probation.

That same day, the court signed an order prepared by defense counsel and the prosecutor for the return of property to defendant. The property included, among other things, a computer tower. Pertinent to this appeal, the order provided: "As to the Computer Tower listed below, [Orange County District Attorney] shall provide [d]efendant's attorney with the contact information of the Investigator who has custody of the Computer Tower. Defendant shall notify the Investigator as to which of the remaining files should be copied onto a separate hard drive [d]efendant shall provide to that Investigator. Once copied, the original computer tower hard drive will be wiped,[2] and both the hard drive copy and computer tower shall be returned to defendant after Law Enforcement has reviewed all files and ensured no contraband/evidence exists. . . ."

During the investigation in this matter, Los Angeles Sheriff Detective Bernell Trapp came into possession of a computer seized from defendant. The computer tower contains images of defendant having sex with the 13-year-old and 17-year-old female victims alleged in the original information.

In May 2015, defendant—now a disbarred attorney—filed a motion seeking compliance with the above-described order for the return of his property.

At the motion hearing, Sergeant Scott Anger of the Los Angeles Sheriff's Department testified he supervises the high-tech crimes unit. He said it is *possible* to extract noncontraband files from the computer hard drive and transfer them to an external hard drive, but the task is "extremely laborious." An investigator would have to "open each individual file on any given hard drive or any given digital media and go through all the data on each individual file to look for hidden files, hidden pornography, things that may have been changed in order to hide them from the original forensics examination."

[2] It appears the hard drive of the computer contained videos showing defendant committing each of the charges to which he pled guilty (counts 1-8).

On cross-examination by defendant, Anger explained, "We would have to go through the files you chose and systematically deconstruct each file to make sure there were no hidden files that contained child pornography within them." Anger added, "[s]ince it came in with child pornography on it the assumption is there is more there, and we have to make sure there is none when we return it." Anger said reviewing those files to be returned to defendant for child pornography is required for due diligence.

According to Anger, it could take "literally . . . a year or more," based on the number of files on a computer. He said the sheriff's department does not have the funding to do that and his investigators receive an annual salary of $125,000. The thoroughness of such a search is necessary to guarantee the department does not return any child pornography to defendant.

Defendant stated he wanted *all* noncontraband files returned to him and the child pornography "immediate[ly] delet[ed]."

The prosecutor argued that if defendant wanted a limited number of files from the computer tower's hard drive, a forensics investigator could go through those files and transfer them without incurring the expense of opening and viewing all the files on the tower's hard drive, having an investigator go through all the files on the computer's hard drive. She suggested defendant should have to pay for an investigator to go through all the files on the computer if he wants all the files returned.

The court found the government acted in good faith and accepted the prosecutor's representation that she did not know of the technical problems involved when the order for the return of property was drafted. The court found the prosecutor "entered into an agreement that is not feasibly possible" and that the prosecutor agreed to the order "without really knowing the computer science problems." Additionally, the court found the government "met their burden and has justified its position that the cost concerns and the laborious efforts that would have to be made to go through every single thing on that computer are reasonable under the circumstances."

When it was apparent the court was going to deny defendant's motion, defendant suggested he could provide law enforcement with a hard drive onto which the contents of the computer tower's hard drive could be copied. Then the tower's hard drive could be wiped clean and returned to him, along with the computer. That solution appeared to be agreeable to the court, but it hit a snag because defendant insisted the child pornography not be copied onto a hard drive, and be deleted instead.

The court said it appeared defendant was not interested in getting the computer back under the proposed option and to let the prosecutor know if he changed his mind. Earlier, the court offered defendant the alternative of withdrawing his guilty pleas, given he argued the return of property order was indispensable to his decision to change his plea. Defendant declined the court's offer.

The court denied the motion.

DISCUSSION

Defendant contends he is entitled to the specific performance of the order for the return of his property signed on the day he entered his guilty pleas. His moving papers in the superior court were titled a "motion to enforce plea agreement." (Capitalization omitted.) Defendant testified at the hearing on his motion that he pled guilty "in reliance to the order and the representations made in the order."

At the hearing motion, there was testimony that child pornography files can be hidden within other computer files, including Word files, and that it could take a $125,000 a year technician a year or more to "systematically deconstruct" every file on a hard drive to make sure there are no such hidden files anywhere on the hard drive.

This prompted the court to tell defendant the prosecutor could not do what she thought could be done back in 2013. But, the court told defendant he was entitled to withdraw his guilty pleas because he claimed the order was indispensable to them. He declined the court's invitation. It is easy to see why, given the prospect of a state prison sentence and mandatory lifetime sex offender registration under Penal Code section 290.

Turning to the merits, our review of the terms of a plea bargain is de novo when interpretation does not require examination of the credibility of extrinsic evidence. (*People v. Paredes* (2008) 160 Cal.App.4th 496, 507.) Resolution of credibility issues requires application of the substantial evidence test (*ibid*.) and we review a trial court's decision whether to grant specific performance for an abuse of discretion. (See *United States v. Anthony* (9th Cir. 1996) 93 F.3d 614, 616.)

"Plea bargaining is an accepted practice in American criminal procedure. [Citation.] The process is not only constitutionally permissible [citation], but has been characterized as an essential and desirable component of the administration of justice. [Citation.] Concomitant with recognition of the necessity and desirability of the process is the notion that the integrity of the process be maintained by insuring that the state keep its word when it offers inducements in exchange for a plea of guilty." (*People v. Macheno* (1982) 32 Cal.3d 855, 859-860.) "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*Santobello v. New York* (1971) 404 U.S. 257, 262.) When a guilty plea rests on a promise by the prosecution and that promise is violated, there is a constitutional right to a remedy. (*Macheno*, at p. 860.)

Specific performance, however, is neither a favored remedy for a violation of a plea bargain, nor required by the federal Constitution. (*In re Alvernaz* (1992) 2 Cal.4th 924, 942; *People v. Renfro* (2004) 125 Cal.App.4th 223, 233.) "[A] defendant is not entitled to specific performance of a plea bargain 'absent very special circumstances.' [Citation.]" (*People v. Calloway* (1981) 29 Cal.3d 666, 668.) Such very special circumstances do not exist in this case.

Without deciding whether defendant substantially relied on the expectation he would get his computer back with the child pornography removed from it and that he could have all noncontraband files on it if plead guilty, we note the court signed the order the same day defendant pleaded guilty.

The order required law enforcement to remove all child pornography from the computer's hard drive before returning it to defendant. Before returning files from the hard drive that contained child pornography, law enforcement was obligated by the court's order to "review[] all files and ensure[] no contraband/evidence exists." When the order was made, the court was not aware of the amount of work required by law enforcement to guarantee no child pornography in the files returned to defendant.

On the other hand, defendant received the sentence he bargained for. He avoided trial on 17 additional felony charges, mandatory lifetime sex offender registration, a possible long state prison commitment, and was placed on probation. In this context, just how "substantial" the return of property order was to defendant's decision to plead guilty is questionable. Still, the superior court informed defendant it would permit him to withdraw his plea if he so desired. He declined the offer.

When there has been a violation of a plea bargain, which remedy is available and appropriate depends upon a number of factors, including "who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the time of sentencing, and whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate. Due process does not compel that a particular remedy be applied in all cases." (*People v. Mancheno, supra,* 32 Cal.3d at p. 860.) "'The remedy for violation of a plea agreement depends on the circumstances of each case. [Citation.] The typical remedy is to allow the defendant to withdraw his or her guilty plea and go to trial on the original charges. [Citation.]' [Citation.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1224.) Once more, defendant was offered this remedy, but he declined.

Considering the circumstances of the alleged breach in this matter points to permitting withdrawal of the guilty pleas as the appropriate remedy. The prosecutor was not at fault for law enforcement's failure to comply with the order concerning the files on

defendant's hard drive. The court signed the order the prosecutor had agreed to in December 2013. The prosecutor had no hand in law enforcement's refusal to comply with the order thereafter. The violation was based on circumstances not known to the prosecutor or the court at the time the order was prepared and signed. It was only after law enforcement refused that the court and prosecutor became aware of the extreme and prohibitive time and expense involved in complying with the order.

When the court signed the order requiring defendant to let law enforcement know which files he wanted returned from his computer tower's hard drive, it was not aware that to comply with the order (1) law enforcement had to "systematically deconstruct" each and every file selected by defendant to be returned to him to make sure child pornography files had not been hidden within any of the files; and (2) based on the files defendant selected—all files other than the seven showing him having sex with at least one of the victims—the effort could require up to a full year's work for a technician, at a possible expense of $125,000.

It should be noted, the court attempted to provide another appropriate remedy. After being informed of the "extremely laborious" process involved in opening every file on the computer and deconstructing each file to look for hidden files therein containing child pornography, the court asked defendant if he needed *every* file in the computer. In other words, if defendant (who used to be an attorney) would be satisfied with the return of any client files on the hard drive, much less effort and expense would be required to assure those limited number of files do not contain hidden child pornography. But defendant insisted on receiving *all* files on the hard drive. Of course, that included operating system and program files, as well as documents.

What factors are important to a defendant's decision to plead guilty may vary greatly, but in most cases the decision turns on the charges the defendant is to plead to and what the sentence will be. Here, defendant received the sentence he bargained for. He also received the bargained for dismissal of 17 other charged felony counts.

Finally, all of the other property listed in the return of property order was returned to him as agreed.

Because the court was not aware of the extent of the labor and cost required of law enforcement to copy all the files from the computer tower's hard drive onto another hard drive and go through each of those electronic files to guarantee the files do not contain hidden child pornography, and defendant received the sentence he bargained for, specific performance is not an appropriate remedy; withdrawal of his guilty pleas is more appropriate.

For all these reasons, we conclude the trial court did not err in refusing to order law enforcement to further comply with the return of property order.[3]

On January 28, 2019, defendant filed a request for judicial notice with this court, seeking judicial notice of documents filed in opposition to his pending requests for relief under Penal Code sections 17(b) and 1203.4 in the trial court. We deny the request for judicial notice, as those documents are not relevant to the issues in this appeal.

[3] In his opening brief, defendant claims specific performance is not an adequate remedy and the appropriate remedy is for this court to order the underlying case dismissed. The argument is baseless. Also, because defendant did not raise this issue below, he has forfeited the issue on appeal. (*People v. Valdez* (2012) 55 Cal.4th 82, 155.)

DISPOSITION

The order is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.